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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Tehama)

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES JOSEPH PULIZZANO,

Defendant and Appellant.

C082795

(Super. Ct. No. NCR95990)

Following a jury trial, defendant James Joseph Pulizzano was convicted of attempted murder (Pen. Code, § 664/187—count II),¹ attempted voluntary manslaughter (§ 664/192, subd. (a)—count I), felon in possession of a firearm (§ 29800, subd. (a)(1)—count III), two counts of assault with a firearm (§ 245, subd. (a)(2)—counts IV & V), and criminal threats (§ 422, subd. (a)—count VI), with enhancements for personal use of a

¹ Undesignated statutory references are to the Penal Code.

firearm as to the attempted voluntary manslaughter, assault with a firearm, and criminal threats counts (§ 12022.5, subds. (a), (d)) and personally and intentionally discharging a firearm as to the attempted murder count (§ 12022.53, subd. (c)). The trial court sentenced defendant to 29 years four months in state prison.

On appeal, defendant contends the trial court erred in failing to instruct the jury on attempted voluntary manslaughter as a lesser included offense of attempted murder in count II, and there is an error in the abstract regarding one of the firearm enhancements. In a supplemental brief, he contends his case must be remanded to allow the trial court to exercise the sentencing discretion authorized by Senate Bill No. 620 for the section 12022.5 enhancements. Finding no duty to instruct as defendant contends, we shall remand for the trial court to exercise its discretion regarding the enhancements, order an amended abstract, and affirm the judgment in all other respects.

BACKGROUND

In October 2015, Shelly N. was renting a house in Tehama County. Shelly's adult son, Timothy T., and two of Shelly's friends, Theresa S. and Robert C., also resided in the home. Defendant, with whom Shelly was involved romantically, was Shelly's landlord. He lived about two miles from her residence.

Defendant and Shelly fought frequently, primarily over defendant's estranged wife interfering in their relationship. Their relationship came under additional strain on October 23, 2015, when Shelly, accompanied by Timothy, Theresa, and Robert, drove to defendant's residence, kicked the door in, and accused defendant of seeing yet another woman. During the ensuing angry confrontation, Shelly threatened to kill the woman she suspected defendant was seeing. Shelly was probably under the influence of drugs at the time; she left for her house with her companions after the argument ended.

The following day, defendant and Shelly exchanged angry phone calls, with Shelly threatening to stab defendant. Defendant also texted her that he had used methamphetamine that day. Shelly used methamphetamine that day as well.

Defendant drove to Shelly's house later in the afternoon, parking his car in front of the house. He stayed in the car while yelling out the window. Timothy was on the front porch smoking a cigarette. Defendant accused him of stealing his guitar and said he wanted it back.

Shelly approached defendant's car and yelled at him to leave. Defendant and Shelly exchanged angry words and screamed obscenities at each other. Theresa and Robert came outside and proceeded to yell at defendant to leave. As the argument ensued, Timothy went to the side of the house and beat on an outdoor kitchen stove in order to control his anger.

As the argument continued, defendant told Shelly her son was going to "get a beat down" and the "ass-whooping he deserves." This enraged Shelly, who responded by punching defendant in the face. Defendant grabbed her arm and pulled Shelly halfway into the car. As he reached for his pocket, Shelly saw a gun; she then freed herself, yelled "gun," and ran towards the house.

Gunshots rang out as Shelly, Theresa, and Timothy ran to the front door. Shelly pushed Timothy and Theresa inside the house, and then ducked down when she got inside.

Timothy ran through the house to the kitchen. Looking around a cabinet, he saw defendant look in his direction and say, "I'm going to get you, little Motherfucker." Defendant fired a round at Timothy, which whizzed past him. Timothy ran out of the house through the back door and called 911 from a neighbor's property.

Defendant stopped shooting and entered the house. When Shelly asked defendant "why" and what was wrong with him, defendant was silent. After defendant said the gun was in his car, Shelly retrieved the firearm and hid it in a trailer on the property because she loved him and was afraid he would go to jail. She also told defendant to wash the gun residue from his hands.

Tehama County Sheriff's deputies were dispatched at 5:20 p.m. When asked about the gunshots, defendant and Shelly each told the deputies that the noise was fireworks. Shelly later recanted this story and admitted defendant fired his gun. She also told deputies where the gun was hidden.

Expended bullets, fragments, and damage to the house were consistent with bullets being fired at the house. Defendant's car was parked in a location giving it a clear view from the driver's side window to the front door of the house. The gun defendant fired, a revolver, had five spent casings in the cylinder.

DISCUSSION

I

Defendant was charged with the attempted premeditated murder of Shelly in count I and the attempted murder of Timothy in count II. The jury was instructed with attempted voluntary manslaughter as a lesser included offense, but only as to count I. Defendant contends the trial court erred in failing to instruct the jury on attempted voluntary manslaughter as to the attempted murder charge in count II. We disagree.

Every lesser included offense, or theory thereof, must be presented to the jury. (*People v. Breverman* (1998) 19 Cal.4th 142, 155.) However, the court must instruct only on those lesser included offenses supported by substantial evidence. (*People v. Barton* (1995) 12 Cal.4th 186, 203.)

“Attempted murder is the attempt to commit an unlawful killing of a human being, or a fetus, with malice aforethought.” (*People v. Williams* (1988) 199 Cal.App.3d 469, 475.) “A killing committed upon a sudden quarrel or heat of passion or under an honest but unreasonable belief that it is necessary to defend oneself from imminent peril to life or great bodily injury may negate malice aforethought, the mental element necessary for murder, so that the chargeable offense is reduced to attempted manslaughter. [Citation.]” (*Ibid.*)

To establish attempted voluntary manslaughter under a heat of passion theory, both provocation and heat of passion must exist. (*People v. Williams, supra*, 199 Cal.App.3d at p. 475; *People v. Gutierrez* (2003) 112 Cal.App.4th 704, 709.) However, “ “[t]he provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim.” [Citation.]’ ” (*People v. Verdugo* (2010) 50 Cal.4th 263, 294.) Since the only provocation was supplied by Shelly, there was insufficient evidence to support an attempted voluntary manslaughter instruction as to the attempted murder of Timothy in count II.

Defendant asks us to instead apply the Model Penal Code’s definition of manslaughter, which states in pertinent part: “(1) Criminal homicide constitutes manslaughter when: [¶] . . . [¶] (b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.” (Model Pen. Code, § 210.3.)

As defendant admits, the California Supreme Court holds that provocation must come from the victim. We are bound by the Supreme Court’s decision in *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, and accordingly decline the invitation to adopt the Model Penal Code approach.

II

The jury found true section 12022.5 enhancements for personally using a firearm as to the attempted voluntary manslaughter, assault with a firearm, and criminal threats counts, and a section 122022.53, subdivision (c) enhancement for personally and intentionally discharging a firearm as to the attempted murder count. The trial court imposed sentence for each of the enhancements.

Defendant identifies an error in the abstract which states a section 12022.53 enhancement was imposed as to the attempted voluntary manslaughter conviction in count I. We would ordinarily order the trial court to correct the abstract but a development after the case renders such an order premature.

On October 11, 2017, the Governor signed Senate Bill No. 620 (Stats. 2017, ch. 682, § 2). This bill amended sections 12022.5 and 12022.53, effective January 1, 2018, to allow the trial court discretion to dismiss a firearm enhancement imposed pursuant to this section. (§§ 12022.5, subd. (c), 12022.53, subd. (h).)

In a supplemental brief, defendant argues the amended section applies retroactively to his case. The Attorney General agrees. So do we. The amendment to sections 12022.5 and 12022.53 applies retroactively to cases not final on appeal. (*People v. Arredondo* (2018) 21 Cal.App.5th 493, 507; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091.) Unlike the court in *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896, here, we cannot say “the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations.” Accordingly, we shall remand for the trial court to determine whether to exercise its discretion to strike any or all of the enhancements.

While the trial court will have to issue an amended abstract, the form of that abstract cannot yet be determined. The amended abstract will reflect any stricken enhancements, and if the enhancement in count I is not stricken, that this enhancement was pursuant to section 12022.5 rather than section 12022.53. In addition, the trial court is directed to correct the spelling of defendant’s last name on the abstract of judgment. The correct spelling of defendant’s last name is “Pulizzano.”

DISPOSITION

The matter is remanded to the trial court to consider whether to exercise its discretion to strike defendant’s firearm enhancements. The judgment is otherwise affirmed. The trial court is directed to prepare an amended abstract of judgment in

accordance with this opinion and to forward a certified copy to the Department of Corrections and Rehabilitation.

/s/
Blease, Acting P. J.

We concur:

/s/
Robie, J.

/s/
Renner, J.